



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

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OFFICE OF ENFORCEMENT

The Honorable William W. Wilkins, Jr., Chairman  
The United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Dear Judge Wilkins:

The United States Sentencing Commission has requested comments and recommendations from the Environmental Protection Agency (EPA) concerning the drafting of proposed amendments to enhance the effectiveness of Part Q of the Sentencing Guidelines, which governs environmental offenses. In response, the Office of Enforcement established a Sentencing Guidelines Workgroup consisting of counsel from this Office and five Regional Criminal Enforcement Counsels, who have most directly participated in the application of Part Q to environmental crimes prosecuted within their Regions. The Workgroup has met to consider previous and current recommendations and to assemble proposed amendments.

In accomplishing this task, the Workgroup also consulted with the Environment and Natural Resources Division of the Department of Justice. Accordingly, the EPA is submitting the enclosed recommendations to the Commission for its consideration. I am certain that the close working relationship that has evolved between the EPA and the Commission will facilitate producing a set of amendments that can be strongly endorsed by both the Commission and EPA.

EPA's proposed amendments address several issues:

- (1) The two separate guidelines for mishandling of hazardous and non-hazardous pollutants would be rendered unnecessary by making the mishandling of a hazardous pollutant a specific offense characteristic under one guideline. (Part 2Q1.2(b)(4)) This would not alter the penalty based on the sentencing table since a hazardous pollutant would still cause an increase of two offense levels.

Pesticides should not be included within this specific offense characteristic, since the FIFRA definition of a pesticide can include a non-toxic substance (i.e., water) provided it is a killing agent for any pest, 7 U.S.C. § 136(u). If a specific chemical in a pesticide is hazardous, it would be a CERCLA hazardous substance or CWA toxic pollutant, and a pesticide, if disposed, may be a RCRA hazardous waste.

(2) It is the Agency's judgment that the integrity violations, which imperil the Government's compliance monitoring functions and can result in serious endangerment to public health and the environment, are sufficiently different in their nature from actual mishandling violations as to warrant a separate guideline, rather than being an "add-on" as a "simple record keeping" specific offense characteristic to Parts 2Q1.2 and 2Q1.3.

Under a separate guideline for an integrity violation, if serious consequences flow from an integrity violation, then a more severe penalty will result, because of the specific offense characteristics in proposed new Part 2Q1.3. For instance, a failure to report health and safety data as required by TSCA, 15 U.S.C. § 2607, can result, when preventative measures are thereby avoided, in substantial harm to persons. A failure to report a release of a hazardous substance as required by CERCLA, 42 U.S.C. § 9603(a), can result in severe and widespread environmental harm by preventing an appropriate and prompt response to the release.

(3) It was concluded that Part Q presently does not adequately address the degrees of environmental economic harm that can result from an offense. Corresponding increases in offense levels are proposed throughout. (Part 2Q1.1, 2, and 3) The knowing endangerment guideline (Part 2Q1.1) also needs several specific offense characteristics which address any resulting damages/harm that can be associated with the commission of such an offense, because another substantive environmental violation may not necessarily accompany a knowing endangerment conviction.

(4) Likewise, the Guidelines now only provide for one, six-level increase for ongoing, repetitive offenses. Stepped offense-level increases are proposed, depending on the duration of the offense. (Part 2Q1.1, 2, and 3)

(5) Violations of a condition of a permit are encompassed in the substantive offense itself, and it is somewhat redundant for this to be a separate specific offense characteristic. The failure to obtain a permit or license, though, definitely should be a specific offense characteristic since this penalizes more severely those who choose to operate entirely outside the regulatory system. (Part 2Q1.2(b)(6))

(6) Criminal violations of TSCA and FIFRA, unfortunately, remain misdemeanor violations. The only way to account for this anomaly is to provide a specific departure in offense levels for such violations. (Part 2Q1.2, Application Note 7). Once these statutes are amended to felony levels to be consistent with other environmental criminal provisions, the Guideline can be amended accordingly.

(7) Our proposed amended mishandling-of-pollutant guideline has separate specific offense characteristics for actually causing death/serious bodily injury, and for causing a substantial likelihood of such harm. (Part 2Q.1.2(b)(1) and (2)) These would apply to those situations where such consequences are not knowingly foreseen, but nonetheless are a consequence of the crime.

Thank you for the opportunity to comment on the Sentencing Commission's proposed amendments. We look forward to continuing our close and fruitful relationship with the Commission. Counsel Bruce Bellin (475-9662) of the Office of Criminal Enforcement is available to work with the Commission in further developing proposed amendments for consideration by the Commission and Congress.

Sincerely,



James M. Strock  
Assistant Administrator

Enclosure

cc: Richard B. Stewart  
Assistant Attorney General, DOJ

*Please do not hesitate to let  
me know at any time if I  
may be of any use*

Recommended Amendments: Part O - Environmental Offenses

§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances or Other Pollutants.

(a) Base Offense Level: 24.

(b) Specific Offense Characteristics:

- (1) If the offense caused damages or involved harm to the environment (including actual or reasonably estimated restoration or clean-up costs) in the amount of:
  - (A) \$50,000 - \$250,000, increase by 2 levels;
  - (B) \$250,001 - \$1 million, increase by 3 levels;
  - (C) \$1,000,001 - \$5 million, increase by 4 levels; or
  - (D) Over \$5 million, increase by 6 levels.
- (2) If the offense involved the disposal, discharge, release, or emission of an environmental pollutant that was repeated, ongoing, or continuous for:
  - (A) 2 - 5 days or repetitions, increase by 1 level;
  - (B) 6 - 15 days or repetitions, increase by 2 levels;
  - (C) 16 - 30 days or repetitions, increase by 3 levels; or
  - (D) More than 30 days or repetitions, increase by 4 levels.
- (3) If death results, increase to level 33.

§2Q1.2. Mishandling of Environmental Pollutants

(a) Base Offense Level: 6

(b) Specific Offense Characteristics:

(1) If the offense caused serious bodily injury or death, increase by 10 levels.

(2) If the offense caused a substantial likelihood of death or serious bodily injury, caused an evacuation, or caused a disruption of public services, increase by 6 levels.

(3) If the offense caused damages or involved harm to the environment (including actual or reasonably estimated restoration or clean up costs) in the amount of:

(A) \$50,000 - \$250,000, increase by 2 levels;

(B) \$250,001 - \$1 million, increase by 3 levels;

(C) \$1,000,001 - \$5 million, increase by 4 levels; or

(D) Over \$5 million, increase by 6 levels.

(4) If the offense involved the mishandling of a hazardous or toxic substance, increase by 2 levels.

(5) If the offense involved the disposal, discharge, release, or emission of an environmental pollutant that was repeated, ongoing, or continuous for:

(A) 2 - 5 days or repetitions, increase by 1 level;

(B) 6 - 15 days or repetitions, increase by 2 levels;

(C) 16 - 30 days or repetitions, increase by 3 levels; or

(D) More than 30 days or repetitions, increase by 4 levels.

(6) If the offense involved a failure to obtain a permit, license, or consent, or a violation of an international agreement or a failure to have a required manifest, increase by 2 levels.

(7) If the offense resulted in a discharge, emission, or release of an environmental pollutant, increase by 4 levels.

(8) If the offense was committed in violation of an order:

(A) If the order was issued by an administrative agency, increase by 2 levels; and

(B) If the order was issued by a court, increase by 3 levels.

#### Application Notes Amendments

1. This section applies to offenses which may involve substances designated toxic or hazardous at the time of the offense by statute or regulation. A listing of hazardous and toxic substances in the guidelines would be impractical. Several federal statutes (or regulations promulgated thereunder) list toxic substances, hazardous wastes, and hazardous substances. These lists, such as those of toxic pollutants for which effluent standards are published under the Federal Water Pollution Control Act (*e.g.*, 33 U.S.C. § 1317), as well as the designation of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (*e.g.*, 42 U.S.C. § 9601(14)), are revised from time to time. If a substance involved in a violation appears on any of those lists, it shall be considered hazardous or toxic for purposes of applying this guideline.

2. "Disruption of public services" is one basis for an offense level increase under sub-section (b)(2). Examples of such disruptions are sewer system contaminations, which cause publicly-owned sewage treatment works to fail to adequately treat in-coming pollutants, and water pollutant discharges which force the closing of drinking water intakes.

3. Sub-section (b)(6) adds 2 levels for failure to obtain a required permit or license. This includes any equivalent to a permit or license which may be required under a state or local pollution abatement program, for example, for a tie-in to a municipal or regional sewage treatment system. It also applies to the transportation of hazardous wastes without a manifest, to the failure to secure a receiving country's consent for the export of hazardous waste, and to such export in violation of any international agreement.

Sub-section (b)(6) also applies to situations in which an activity can only be carried out legally with a permit or its equivalent, but in which no such permit would be issued for the type of activity involved in the violation. For example, discharges of pollutants into waters of the United States can only be carried out legally in accordance with a permit. See 33 U.S.C. § 131(a), 1319(e) and 1342. However, a permit would not be issued for a person to discharge a tanker load of spent industrial solvents into a river. Similarly, a permit would not be issued for a person to dispose of a load of drums of hazardous wastes by dumping them along a roadside. In any such case, though, the addition of 2 levels under sub-section (b)(6) would apply.

Additionally, sub-section (b)(6) applies to a situation in which a person knowingly transports hazardous wastes to a facility which does not have a permit, in violation of 42 U.S.C. § 6928 (d)(1). Although the transporter may not be responsible for securing a permit for a disposal site, still he is responsible for assuring that a site to which he delivers hazardous wastes is a properly permitted one.

4. Sub-section (b)(3) requires a monetary assessment of community damages and the natural resources harm to the land, fish, birds, plants, wildlife, air, water, ground water, and drinking water. Factors to be considered in making this determination include:

- a) the costs necessary for the cleanup or removal of the pollutant or contaminant from the environment, the disposal of the removed material and the taking of such other actions as may be necessary to prevent, minimize, to mitigate damage to the public health or welfare or to the environment, which may otherwise result from the violation;
- b) the costs of the interruption or loss of economic livelihood caused by the environmental violation;
- c) the costs of evacuation or permanent or temporary relocation of residences and businesses and community facilities caused by the environmental violation;
- d) the value of the wildlife, plants, and other natural resources injured or killed by the environmental violation; and
- e) the costs of restoration of the natural resources.

5. Sub-section (b)(5) takes into account repetitious, on-going, or continuous environmental violations. The stepped increases depend either upon the number of days of repetition or continuity or upon the number of repetitions themselves, if each repetition could be independently charged under the applicable statute. For an example of a situation in which individual repetitions are taken into account, on a single day a person hauls eight loads of hazardous wastes into nearby woods and dumps them. Each of those loads represents a separate violation under 42 U.S.C. § 6928(d)(2)(A), even though all of them occurred on the same day. Therefore, sub-section (b)(5)(B) would apply and an increase of 2 levels would be added.

6. The increments in sub-section (b)(5) for only up to 30 days. However, environmental laws are particularly susceptible to extended repetitive or continuous violations (e.g., a year's illegal storage of hazardous wastes or months of unpermitted water pollutant discharges, each day of which would be a felony). Therefore, for daily or repetitive violations extending beyond 30 cumulative days an upward departure of up to 4 levels may be warranted.

7. Criminal violations of several environmental statutes, principally the Toxic Substances Control Act, 15 U.S.C. § 2615(b) and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(b), remain statutory misdemeanors. A downward departure of up to 3 levels may be warranted for these types of convictions.

### 2Q1.3 Failure to Report, Recordkeeping, Falsification, and Tampering Offenses

(a) Base Offense Level: 6

(b) Specific Offense Characteristics:

(1) If the offense reflected an effort to conceal a substantive environmental offense, release, discharge, or emission of an environmental pollutant, increase by 4 levels.

(2) If the offense caused serious bodily injury or death increase by 10 levels.

(3) If the offense caused a substantial likelihood of death or serious bodily injury, caused an evacuation, or caused a disruption of public services increase by 6 levels.

(4) If the offense caused damages or involved harm to the environment (including actual or reasonably estimated restoration or clean up costs) in the amount of:

- (A) \$50,000 - \$250,000, increase by 2 levels;
- (B) \$250,001 - \$1 million, increase by 3 levels;
- (C) \$1,000,001 - \$5 million, increase by 4 levels; or
- (D) Over \$5 million, increase by 6 levels.

(5) If the offense involved a hazardous or toxic substance, increase by 2 levels.

(6) If the offense involved more than;

- (A) 2 - 5 days or repetitions, increase by one level;
- (B) 6 - 15 days or repetitions, increase by 2 levels;
- (C) 16 - 30 days or repetitions, increase by 3 levels; or
- (D) More than 30 days or repetitions, increase by 4 levels.